DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Supra's Motion to Strike BellSouth's letter of October 30, 2001, to Blanca Bayo; Strike BellSouth's post-hearing position/summary with respect to Issue B; and to Alter/Amend Final Order pursuant to F.R.C.P. 1.540(B)?

RECOMMENDATION: No. **(Keating, Knight)**

STAFF ANALYSIS:

ARGUMENTS

SUPRA

Supra notes that Commission Order No. PSC-01-1401-PCO-TP (Order Establishing Procedure) sets forth the procedures to be followed by the parties in this docket. Supra draws particular attention to the pertinent requirements on page 8 of the Order, that "each party shall file a post-hearing statement of issues and positions" and that "if a party fails to file a post hearing statement in conformance with Rule 28-106.215, Florida Administrative Code, the party shall have waived all issues and may be dismissed from the proceeding." Supra observes that on September 25, 2001, the Commission entered Order No PSC-01-1926-PHO-TP, which included a new issue, noted as Issue B, that asked: "Which agreement template shall be used as the base agreement into which the Commission's decision on the disputed issues will be incorporated." Supra notes that while BellSouth briefly discussed Issue B in its post-hearing brief, it failed to provide a summary of the issue as required by the Order Establishing Procedure.

Supra states that in reviewing documents received as a result of a public records request made to the Commission, it believes that certain e-mails indicate that in October of 2001, Wayne Knight, the lead staff attorney in this docket, initiated a communication with Mike Twomey of BellSouth, for the purpose of informing Mr. Twomey that BellSouth had failed to include a position for Issue B in its post-hearing brief. Supra maintains that Mr. Twomey subsequently submitted a letter to Ms. Bayo as a result of this communication, with a position statement for Issue B. The letter, says Supra, was not a motion or a request for relief, nor did it cite any law or other authority in support of such filing. Supra contends that in its Final Order in this docket,

Order No. PSC-02-0413-FOF-TP, issued March 26, 2002, the Commission adopted BellSouth's late-filed position summary with respect to Issue B.

Supra asserts that the letter should be stricken from the record because it believes: (a) the filing was not authorized and procedurally improper; (b) it is the product of a communication initiated by a Commission staff employee; and (c) the filing violates the Commission's Order Establishing Procedure.

Additionally, maintains Supra, BellSouth's position on Issue B should be stricken and deemed waived pursuant to the Order Establishing Procedure. Supra cites past Commission Orders and looks to Docket No. 000731-TP to buttress its argument. Supra maintains that in that case, AT&T's failure to file a post-hearing statement addressing an issue led to a waiver of its position on that issue. Likewise, contends Supra, the failure to timely file a post-hearing statement regarding three issues in Docket No. 000649-TP, or to request leave to file such, led to the exclusion of those positions in the Commission's decision. Supra believes that a letter attempting to supplement the record, filed after the post-hearing briefs, is procedurally improper and should not be allowed.

Supra also points to several cases for the proposition that papers filed, which are not authorized or violate rules of procedure, are subject to be stricken. See Hicks v. Hicks, 715 So.2d 304, 305 (Fla 5th DCA 1998) (where the Court held that a motion filed by an attorney which violated Rule 2.060, Fla.R.Jud.Admin., was voidable and subject to being stricken. Supra argues that BellSouth's October 30, 2001, letter was likewise procedurally improper, and not authorized by either the rules or the Order Establishing Procedure. As such, claims Supra, it should be stricken and BellSouth's position on Issue B waived in accordance with the Order Establishing Procedure and Supra's cited precedence.

Supra also asks the Commission to change the Final Order to reflect Supra's position on Issue B. Supra believes Florida Rule of Civil Procedure, 1.540(b) supports this request, where it reads in pertinent part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party of a

> party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more that 1 year after the judgment, decree, order, or proceeding, was entered or taken. . . .

Supra believes that in accordance with prior decisions, this rule is to be liberally construed to allow a party to be relieved of an order which in part, was procured through misconduct discovered after entry of the order. See Lacore v. Giralda Bake Shop, Inc., 407 So.2d 275, 276 (Fla. 3d DCA 1981); In re: Adoption of a Minor Child, 593 So.2d 1209 (Fla. 1991) Here, Supra maintains that the communication between BellSouth and Wayne Knight assisted BellSouth in the litigation of this docket after it had missed a substantive deadline, and was done without the knowledge of Supra. This, says Supra, can only be characterized as misconduct. Supra also believes that BellSouth engaged in misconduct by participating in the communication regarding a substantive deadline, not adequately disclosing the events leading to its October 30, 2001, letter, and in late filing an amendment to its post-hearing brief.

Supra contends that had Mr. Knight not communicated BellSouth's failure to comply with a substantive deadline, it would have prevailed on the issue. As it believes Mr. Knight's communication goes to the merits of the issue, Supra maintains that the Commission's ruling on Issue B should be reversed, and changed to reflect Supra's position on the issue.

BELLSOUTH

BellSouth believes that this motion, along with the seventeen (17) others filed by Supra, have been filed for the purpose of delaying operating under a new interconnection agreement. BellSouth characterizes its October 30, 2001, letter to Blanco Bayo, as being meant to correct an unintentional scrivener's error in its post hearing brief as well as the portion of BellSouth's brief relating to Issue B.

BellSouth first contends that Supra waived any objection to the October 30, 2001, letter, and contends that the equities dictate that Supra's motion be denied. BellSouth states that Supra received both its post-hearing brief and the October letter, yet waited until after the staff issued a recommendation, the Commission issued a Final Order, the Commission ruled on Supra's post-hearing motions, including a motion for reconsideration of Issue B, before now claiming that the letter was procedurally improper. BellSouth believes that in waiting seven months after BellSouth corrected its scrivener's error, and after the Commission resolved all of Supra's post-hearing motions, Supra has waived any objection to the letter or to BellSouth's post hearing brief. BellSouth characterizes Supra's motion as an untimely request for the Commission to reconsider and reverse itself on Issue B.

BellSouth also contends that it would be inequitable to grant Supra's requested relief at this point in time, as it believes the proceedings are complete and BellSouth would be left without an opportunity to cure any purported procedural defect. BellSouth believes that if there was an error, it could have been cured if had Supra raised its objection in a timely manner.

BellSouth's second argument is that it did not violate the procedural order or otherwise waive its right to assert a position on Issue B. BellSouth maintains that it submitted a post-hearing statement on all issues in the arbitration, including Issue B; that it submitted summaries for all other issues; and the October 31, 2001, letter corrected its scrivener's error.

According to BellSouth, the procedural order, Order No. PSC-01-1401-PCO-TP, provides that a party is required to file a post-hearing statement of issues and positions pursuant to Rule 28-106.215, and that the failure to file this post-hearing statement results in a waiver of all issues and potential dismissal from the proceeding. The Rule, asserts BellSouth, makes no mention of summary position statements. BellSouth maintains that it filed a post hearing statement, and thus complied with the procedural order. BellSouth also claims that Supra's reference to Issue L of the BellSouth/AT&T arbitration actually supports its argument. There, says BellSouth, it was found to have waived its position on issue L because it failed to "present any evidence on the issue at hearing or in its brief." In the instant docket, BellSouth maintains that it has done both. BellSouth also distinguishes Order No. PSC-01-0824-FOF-TP, as cited by Supra, noting that while

the Commission's decision there was predicated on its failure to address three issues in its post-hearing brief, its failure to file a summary position statement was not at issue.

As a tertiary matter, BellSouth maintains that its October 30, 2001, letter was procedurally proper. Along with its assertion that Supra waived its right to BellSouth's correction of what it deemed an oversight, BellSouth states that parties routinely submit letters to the Commission to correct scrivener's errors or other error that do not affect the substance of an argument. BellSouth notes that recently Florida Cable Telecommunications Association, Inc. and Time Warner Telecom of Florida, L.P. inadvertently omitted their summary position statements in their original post-hearing briefs due to a scrivener's error, and on June 18, 2002, they filed a letter with the Commission to include a corrected post-hearing brief that specifically included their summary position statements. BellSouth also notes that Supra, in this docket on May 8, 2002, filed a letter instead of a motion to correct errors in one of its previous filings. BellSouth asserts that its letter of October 30, 2001, similar to the letters of FCCA and Time Warner, and of Supra, did not affect or modify any of the substantive arguments that BellSouth made in its post-hearing brief, but simply summarized the arguments set forth in its brief. As such, says BellSouth, the letter was proper and should not be stricken.

BellSouth also believes that the letter actually complies with Rule 28-106.204(1), to the extent that it seeks affirmative relief and is in writing. Citing Mendoza v Board of County Commissioners/Dade County, 221 So. 2d 797, 798(Fla. 3rd DCA 1969) for the notion that "courts should look to the substance of a motion and not to the title alone," BellSouth asserts that its letter is similar to those filed by Supra in this docket seeking affirmative relief. Thus, according to BellSouth, Rule 28-106.204's requirement that responses to motions must be submitted within seven days serves to time-bar Supra's instant motion.

BellSouth further contends that Supra's request for a modified order pursuant to Rule 1.540(b) should be denied. BellSouth contends that Supra does not meet the standard to obtain relief for newly discovered evidence because it does not believe that Supra's evidence would change the result in a new trial, and it believes Supra's motion is untimely. Further, BellSouth asserts that Supra does not meet the standard to obtain relief for misconduct because no misconduct occurred, and the Commission has previously

determined that no misconduct occurred. BellSouth also asserts that the conduct for which Supra now complains did not prevent Supra from presenting its case.

BellSouth also argues that Supra's request cannot be granted under Rule 1.540(b), and that its Motion under this rule is barred by the doctrine of *res judicata*, because final judgment in this matter has already been rendered.

Analysis

The crux of Supra's contention is the BellSouth was improperly allowed to modify its post-hearing statement, and that had BellSouth not been allowed to do so, BellSouth's position on Issue B would have been waived in accordance with the Order Establishing Procedure, Order No. PSC-01-1401-PCO-TP. Staff notes that similar language is contained in the Prehearing Order in this Case, Order No. PSC-01-1926-PHO-TP. As such, Supra believes that its argument on this issue would have carried the day on Issue B; thus, the Final Order should be modified to so reflect a decision in Supra's favor.

Supra, however, misinterprets the provisions of the Order Establishing Procedure as they relate to the filing of post-hearing statements. Specifically, the Order in this case states, in pertinent part:

> Each party shall file a post-hearing statement of issues and positions. ***A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement.*** If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. ***If a party fails to file a post-hearing statement in [conformance with the rule][1], that party shall have waived all issues and may be dismissed from the proceeding.*** (Emphasis added)

[1]Bracketed portion is omitted in subsequent Prehearing Order, because the reference to conformance with "the rule" pertains to former Rule 25-22.056, F.A.C., which was repealed.

Order No. PSC-01-1401-PCO-TP at pg. 8. See also Order No. PSC-01-1926-PHO-TP at p. 8. The Order does clearly state that a summary of a party's position is required. However, the Order does not indicate that failure to include the **summary** results in waiver of a party's position; rather, the Order reflects that failure to file a **post-hearing statement** results in waiver. BellSouth did, in fact, timely file a post-hearing statement addressing all issues, including Issue B. The company simply neglected to include a summary of is post hearing statement for Issue B. Thus, based on the provisions of the Order Establishing Procedure, as well as the superceding Prehearing Order, BellSouth did not waive its position on Issue B. Staff notes that while the Commission has determined that parties have waived their positions on specific issues by failing to file a post-hearing statement on an issue, staff has not found any instance where the Commission determined that a party waived its position on all issues because it failed to file a post-hearing statement on one issue. Furthermore and directly to the issue at hand, staff has not found any instance where the Commission has deemed a party to have waived their position on an issue through inadvertent omission of the summary.

As for staff's decision to contact BellSouth to identify the omission of the summary, staff has typically viewed this type of error as administrative, which should, and may properly, be identified to the responsible party, because the oversight does not have any dispositive impact on the issue or the case. One-on-one contact between staff and a party to discuss a non-substantive matter, the omission of the summary of BellSouth's position, is not prohibited by Rule 25-22.033, Florida Administrative Code or Administrative Procedures Manual 13.10.[2]

Furthermore, it is staff's understanding that the requirement for a summary has generally been included in the post-hearing procedural requirements largely to facilitate proper reflection of the parties' correct position summary in the POSITIONS OF PARTIES section of staff's post-hearing recommendations. The summary does not address the specifics of the parties' arguments, which are more fully set forth in the post-hearing statement itself and addressed

[2]Staff notes that this situation is not unlike staff's inquiry as to Supra's omission of its prehearing statement position on Issue 45, which resulted in Supra submitting its supplemental prehearing statement, without specifically requesting leave to do so, on September 7, 2001. Prehearing statements in the case were originally due August 22, 2001.

in the staff analysis of the recommendation. Thus, the inclusion or omission of the summary would not impair the ability of the Commission to consider the parties' arguments, nor would it be prejudicial to either party in the case. It merely impacts the manner in which the parties' position is summarized for purposes of the preferred format for post-hearing recommendations. In other words, it is inconsequential to the disposition of the matter at issue.

Based on the foregoing, staff recommends that Supra's Motion to Strike BellSouth's letter of October 30, 2001, to Blanca Bayo; Strike BellSouth's post-hearing position/summary with respect to Issue B; and to Alter/Amend Final Order pursuant to F.R.C.P. 1.540(B) be denied.

ISSUE 2: Should the Commission grant Supra's Motion to Compel BellSouth to Continue Good Faith Negotiations of a Follow-Up Agreement?

RECOMMENDATION: No. **(Knight)**

STAFF ANALYSIS:

Arguments

After laying out its summary of the procedural and factual background of this docket, Supra maintains that on June 12, 2002, the day after the Commission Agenda vote on Supra's Motion for Reconsideration, Supra sought to commence good faith negotiations with BellSouth regarding a follow-on agreement. Supra also maintains that it received on June 13, 2002, for the first time, an e-mail version of BellSouth's latest proposed interconnection agreement, and later on June 18, 2002, a second amended version. Supra asserts that beginning on June 17, 2002, and continuing through July 15, 2002, the parties met via telephone on numerous occasions in order to negotiate and resolve final language to be used in the agreement. Supra claims that there have been disputes over previously agreed upon issues because concepts were agreed to with out reference to particular language changes in any template agreement.

Supra believes that the time period for the parties to file a final agreement was simply inadequate. It also asserts that BellSouth has not always been cooperative in negotiating final language in good faith, and that BellSouth's actions in refusing to negotiate in good faith do not comply with the Telecommunications Act of 1996, nor the spirit and intent of this Commission's Order No. PSC-02-0878-FOF-TP. Supra states that it would be impossible to draft a follow-on agreement by July 15, 2002, which accurately incorporates the parties' prior agreements, together with the Commission's substantive rulings. Further, says Supra, BellSouth refuses to continue negotiations without a directive from the Commission to do so. Therefore, Supra requests an Order compelling BellSouth to return to the bargaining table and provide the parties a reasonable amount of time thereafter to complete negotiations.

BellSouth states that Supra's "factual background" is anything but, and goes on to contest the assertions in Supra's motion, believing that its characterizations of the "facts" will show that

Supra's allegations are fabrications. BellSouth maintains that the agreement sent to Supra on June 13, 2002, incorporated the changes decided on June 11, 2002, by reconsideration, and notes at least three other versions it had sent to Supra. BellSouth also claims that the meetings of June 17 and 24, 2002, were devoid of substance, as on one occasion, Supra was not prepared, and in the other instance, Supra's counsel was not available. BellSouth also attempts to show through Exhibit L that it believes only about one third of the ordered issues were discussed. It also claims that Supra spent time disputing and discussing issues which the parties represented to this Commission as either being resolved or withdrawn. BellSouth notes that Supra at no time proposed where language should be placed in any template, and though Supra claims it could not come up with an agreement which complied with the settled issues and the Commission's rulings, BellSouth believes its July 15, 2002, filing does just that.

BellSouth contends that it is Supra who is unwilling or unable to negotiate in good faith by being unprepared for negotiations or revisiting settled issues, and notes that Supra did not seek reconsideration of the Order's fourteen day filing requirement, choosing instead to ignore the order of the Commission. BellSouth asks that the Commission deny Supra's request for relief.

Analysis

The record of this case reflects that BellSouth originally sent Supra a proposed interconnection agreement in September of 2000, nearly two years ago. In March of 2002, after the Agenda in which the Commission originally decided the disputed issues, BellSouth apparently sent Supra an electronic copy of the proposed interconnection agreement. Thereafter on April 25, 2002, BellSouth filed a version with the Commission purporting to comply with the Commission's decision in PSC-02-0413-FOF-TP. On June 13, 2002, after the Commission's Agenda deciding the issues on reconsideration, BellSouth again apparently sent Supra a version of the agreement incorporating the Commission's changes, with an amended version submitted to Supra on June 18, 2002. Also on June 18, 2002, BellSouth apparently provided to Supra a list of each arbitrated issue and how it was resolved. Supra has had ample opportunity to become familiar with BellSouth's agreement template, and ascertain what parts of the agreement would require modification, both to comply with the parties agreed upon and

unarbitrated issues, as well as those issues decided by the Commission.

As early as May 8, 2002, and pursuant to Order No. PSC-02-0637-PCO-TP, Supra was aware that it would have fourteen days after the Commission ruled on its pending Motion for Reconsideration to execute an interconnection agreement. In seeking additional time to file the agreement, Supra stated that it did not want to have to negotiate language for the follow-on agreement twice. This desire not to negotiate language at that time did not relieve Supra of the obligation to familiarize itself with the language of the agreement, prepare alternative language, and generally become conversant on the issues given the time period afforded the parties. The parties' awareness of the time constraints also meant that the obligation was on both parties to provide the time and resources necessary to complete the task as ordered by the Commission. Neither party is a virgin to the negotiation and arbitration process, and both are well aware of the back and forth dialogue that ensues in situations such as this, as well as the occasional need to review positions and issues with other persons in their respective organizations.

Supra provided neither the time nor resources necessary to complete the negotiation process and file an agreement on July 15, 2002, as ordered by the Commission. By way of example, a review of the parties' e-mails reveals that on June 18, 2002, Greg Follensbee noted that because of the time constraints, he and Parkey Jordan would clear their calendars all of the following week in an attempt to finish reviewing the proposed agreement. The parties had not discussed substantive issues in their June 17, 2002, meeting. The meeting of June 24, 2002, was cancelled due to Supra's outside counsel's emergency. No meeting was held on the following day. Supra suggested meeting on Wednesday, a day it knew, or should have known, it was deposing BellSouth's negotiator Greg Follensbee in another arbitration. Then, Supra indicated that its expert, David Nilson, would be unavailable Friday, leaving outside counsel only able to discuss a few issues.

Save a discussion on June 28, 2002, indicating that in paragraph 16 of the General Terms and Conditions, the word "shall" should be changed back to "may," staff has failed to unearth an example of Supra proposing language for inclusion into this agreement. It is clear that no alternative language was filed by Supra on the required date, July 15, 2002. If Supra continued to

disagree with BellSouth's interpretations of issues and inclusive language, Supra could have formulated its own language and submitted that to the Commission in an attempt to comply with the Commission's Order. This was certainly possible, as demonstrated by BellSouth's filing.

Finally, the Commission was very clear that the signed agreement must be filed by July 15, 2002. There was no contemplation by the Commission of further extensions for the parties to negotiate. It was explicit that the Commission believed it imperative that a new agreement be timely filed.

Based on the foregoing, staff recommends that Supra's Motion to Compel BellSouth to Continue Good Faith Negotiations of a Follow-Up Agreement, should be denied.

ISSUE 3: Should the Commission grant BellSouth's Motion for Expedited Commission Action?

RECOMMENDATION: The Motion should be granted, in part, and denied, in part, as set forth in the staff analysis. **(Keating)**

STAFF ANALYSIS:

Arguments

BELLSOUTH

BellSouth asserts that after two years, it is now time for a final resolution of this case. BellSouth emphasizes that the Commission has been to hearing, resolved the issues, addressed reconsideration, as well as numerous procedural motions, and now is presented with an interconnection agreement that complies with its decisions in the case. BellSouth contends that in keeping with its actions throughout this case, Supra has refused to reasonably participate in negotiations to prepare the final arbitrated agreement, in spite of numerous scheduled negotiation meetings, and has consequently refused to sign the version of the agreement prepared and submitted by BellSouth.

BellSouth notes that as of the morning of July 15, 2002, the date upon which the final signed agreement was due, Supra had only identified four arbitrated issues, Issues 1, 10, 11 A & B, and Issue 49, upon which it could not agree to final language with BellSouth. While discussions between the parties resulted in some modifications, disagreement still remains on these issues. BellSouth indicates that while Issue 19 is also at issue, Supra had stated that it simply needed more time to review BellSouth's proposed language to address this issue, but did not yet have any specific objection to the language. As of July 15, 2002, BellSouth asserts that Supra had not even mentioned 24 of the issues addressed through the Commission's arbitration.

BellSouth acknowledges Supra's contentions that engaging in the negotiation of a new interconnection agreement is a daunting, arduous task, but emphasizes that Supra has not used the considerable time available since the Commission's final arbitration decision to engage in the discussions necessary to develop the final agreement. BellSouth contends that the Commission established a very clear deadline for the filing of the parties' interconnection agreement; Supra has "made little effort

to review an agreement that BellSouth worked hard to prepare" and has not been prepared to participate in scheduled negotiation meetings. Motion at p. 9.

BellSouth claims that a new interconnection agreement must be approved expeditiously to prevent further harm to BellSouth. The company contends that Supra receives wholesale services from BellSouth for over 300,000 customers. According to BellSouth, Supra receives payment from its customers for the services rendered to them, but does not pay BellSouth for the wholesale services BellSouth has provided to Supra. BellSouth contends that this has an adverse effect on competition in the state, because Supra is able to obtain an advantage over other CLECs that do timely pay their bills. Due to this advantage, BellSouth believes that Supra is able to devote more resources to advertising than would a similarly-situated CLEC that pays its bills.

BellSouth notes that under the Reservation of Rights Clause in the new agreement, Section 25.1, execution of and operation under the new agreement does not waive either parties' rights to pursue appellate relief. Thus, BellSouth emphasizes that either party will be able to continue to seek relief through the appellate courts, and Supra will not be harmed because its appellate rights will not be affected.

For the foregoing reasons, BellSouth requests the following specific relief:

1. A decision by the Commission on its Emergency Motion for Expedited Commission Action at the first available Agenda Conference;

2. Supra should be required by the Commission to take one of the following actions within seven (7) days of the Agenda Conference decision:

A. Sign the new agreement filed by BellSouth on July 15, 2002; or

B. Pursuant to 252(i) of the Act, opt into an existing agreement entered into by BellSouth and approved by the Commission, subject to the requirements of 47 C.F.R. § 51.809.

3. The Commission should order that, if Supra does not take one of the actions identified above within 7 days of the Agenda Conference decision, the existing agreement between BellSouth and Supra is immediately deemed terminated and declared null and void. (Motion at p. 14.)

BellSouth also offers an alternative request for relief:

1. The Commission should order the parties to immediately begin operating under the agreement filed by BellSouth on July 15, 2002, as of the date of the Agenda Conference at which BellSouth's motion is decided; or

2. The Commission should order that BellSouth is relieved of the duty to provide services to Supra as of the date of the Agenda Conference.

In addition, BellSouth asks the Commission to sanction Supra for bad faith, award BellSouth attorneys' fees, and provide any other relief the Commission finds appropriate.

BellSouth notes that there is precedent for the action it requests. In an Order from the California Public Utilities Commission, Decision No. 01-06-073, 2001 Cal. PUC LEXIS 600, issued June 28, 2001, wherein the parties were directed to either sign PAC Bell's proposed agreement, terminate the existing agreement, or Supra was to opt into an existing agreement. The parties chose to terminate the agreement.

SUPRA

Supra contends that it has devoted hundreds of man-hours to reviewing BellSouth's proposed agreement, reviewing the parties' prior agreements, reviewing the Commission's orders, documenting problems with the proposed agreement, and attempting to negotiate with BellSouth. Supra contends that BellSouth's request to expedite approval of the unilaterally filed agreement is a "gaming tactic" designed to have the Commission force an unacceptable agreement upon Supra.

Supra further contends that BellSouth's request for expedited treatment is made in bad faith, because BellSouth has not even attempted to negotiate acceptable language with Supra and has failed to properly reflect the areas on which the parties did agree

prior to arbitration. Supra contends that this motion is designed to avoid due process in an effort to quickly escape the parties' current agreement. Supra maintains that the July 15, 2002, version of the agreement is "riddled with mistakes, inaccuracies and other language. . . ." For these reasons, Supra asks that the Motion for Expedited Commission Action be denied.

Analysis

This Docket was opened on September 1, 2000. The Final Order on Arbitration was issued in this Docket on March 26, 2002. The Order on the parties' various procedural motions and motions for reconsideration, Order No. PSC-02-0878-FOF-TP, was issued July 1, 2002. Therein, the Commission clearly stated:

> As noted by Supra, we have the authority to show cause a party which fails to sign an arbitrated interconnection agreement in the event there is no good cause for failing to execute the agreement. We now place the parties on notice that if the parties or a party refuses to submit a jointly executed agreement as required by Order No. PSC-02-0637-PCO-TP and Order No. 02-0143-FOF-TP within fourteen (14) days of the issuance of a final order on Supra's Motion for Reconsideration, we may impose a $25,000 per day penalty for each day the agreement has not been submitted thereafter in accordance with Section 364.285, Florida Statutes.

Order at p. 65. The parties have had ample time in which to reach an agreement on a final interconnection agreement. Based on the time that has passed, the exhibits attached to BellSouth's pleading, and the numerous procedural motions filed in this case by Supra, it appears to staff that Supra has devoted insufficient resources to the negotiation of a final agreement -- perhaps intentionally.

While staff believes that the Commission clearly has the authority to sanction or fine Supra for its failure to sign an agreement, or even to submit its own version of an agreement, by July 15, 2002, in this circumstance, staff believes that the best remedy is simply to impose BellSouth's primary request for relief, which is that Supra either sign the agreement proposed by BellSouth, opt into another existing, approved agreement, or the existing agreement will be considered terminated, null, and void.

Staff does, however, recommend a slight extension of the seven day requirement requested by BellSouth. Staff believes that requiring the parties to file within 10 days would be more reasonable. Additional time would allow for some additional discussion between the parties, sufficient time to get the required signatures and have the agreement filed, or for Supra to make a determination as to which other existing agreement it may wish to adopt.

Staff emphasizes that the agreement the parties continue to operate under was approved by the Commission. Section 2.3 of that Agreement states that should the parties petition the Commission for arbitration of unresolved issues, the parties would encourage the Commission to resolve the disputed issues prior to the expiration of the current agreement. If that did not occur, the parties agreed to continue to operate under the terms of the "current" terminated agreement until the subsequent agreement became effective. The agreement clearly contemplated that the current agreement would eventually terminate. But for the Supra's apparent failure to devote sufficient resources to negotiating a new agreement reflecting the Commission's arbitration decisions, there might very well be a subsequent, executed agreement for the Commission to approve. The "current" agreement also clearly contemplates that both parties would endeavor to resolve any outstanding issues in order to develop a subsequent agreement. That has not occurred in this case; therefore, staff believes it is within the Commission's authority to require that the "current" agreement be terminated, including the provisions of Section 2.3, which require that the parties continue to operate under the terms of the current agreement pending approval of a new agreement. As noted by BellSouth, the California Commission has taken similar action in a similar situation under the same federal Telecommunications Act.

While staff believes that the relief identified above is sufficient in this matter, staff notes that, if the Commission so chooses, it does have the ability to impose sanctions. In Order No. PSC-96-1320-FOF-WS, the Commission relied on Mercedes Lighting and Elec. Supply, Inc. v. State, Dep't of General Services, 567 So. 2d 272, 278 (Fla. 1st DCA 1990) in rendering its decision on a request for attorney's fees and costs. The Commission noted that in Mercedes Lighting, the court stated:

> The rule [against frivolous or improper pleadings contained in Rule 11, Federal Rules of Civil Procedure]

> is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." The court further noted, that "a claim or defense so meritless as to warrant sanctions, should have been susceptible to summary disposition.

Order No. PSC-96-1320-FOF-WS at p. 21, citing Mercedes Lighting, 567 So. 2d at 276. The Commission also noted the court's determination that improper purpose in a pleading "may be manifested by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake." Id. at 278, Order No. PSC-96-1320-FOF-WS at 19. The Commission added that ". . . it is important to consider what was reasonable at the time the pleading was filed." Order No. PSC-96-1320-FOF-WS at p. 20. The Commission also stated that there must be some legal justification for the filing in question. Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495, at p. 21.

Based on the foregoing, staff recommends that the parties be required to file a signed version of the interconnection agreement within 10 days of the Commission's decision at the Agenda Conference. If the parties file a signed agreement, staff recommends that the staff be allowed to review and administratively approve the final agreement if it complies with the Commission's Order and the Telecommunications Act. If the parties do not file a signed agreement within 10 days of the Agenda Conference, the existing agreement under which the parties' have continued to operate should be deemed terminated, and declared null and void. Supra may, however, adopt another existing, approved interconnection agreement with BellSouth, if it so chooses.

ISSUE 4: Should Supra's July 22, 2002, Motion to Strike the July 15, 2002, Agreement filed by BellSouth be granted?

RECOMMENDATION: No. The Motion should be denied. **(Keating)**

STAFF ANALYSIS: Supra argues that the agreement filed by BellSouth on July 15, 2002, does not fully incorporate the parties' voluntary agreements on issues not decided by the Commission. Supra contends that because the agreement does not incorporate the parties' voluntary agreements, the Commission cannot "shove the nonconforming agreement down Supra's throat." Supra maintains that although the Commission directed the parties to file a jointly executed interconnection agreement, it did not order Supra to sign an agreement that does not reflect the parties' voluntary agreements. Supra therefore asks that the Commission strike the filing by BellSouth as a filing interposed for purposes of delay, harassment, or frivolous increase in expense, in violation of Section 120.569(2)(e), Florida Statutes, Rule 2.060(c), Florida Rules of Judicial Administration, and Rules 1.140 and 1.150, Florida Rules of Civil Procedure.

Staff does not believe that BellSouth's July 15, 2002, filing violates the standards of Section 120.569(2)(e), Florida Statutes, nor Rule 2.060, Florida Rules of Judicial Administration, although staff notes that Rule 2.060 is not applicable to administrative proceedings. The July 15, 2002, filing by BellSouth does not appear to be filed for purposes of delay, but instead in an effort to comply with the Commission's decisions in this Docket. As for Rule 1.140, Florida Rules of Civil Procedure, staff also believes the July 15, 2002, filing complies with this rule in that the pleading does not appear to be "redundant, immaterial, impertinent, or scandalous." Rather, it is a filing apparently aimed at complying with the Commission's Orders Nos. PSC-02-0637-PCO-TP and PSC-02-0878-FOF-TP. The mere fact that the agreement filed was not executed by both parties does not render the filing "redundant, immaterial, impertinent, or scandalous." Likewise, staff does not believe the pleading violates Rule 1.150, Florida Rules of Civil Procedure, because it is not a "sham" pleading.

Furthermore, the parties were directed to file an agreement complying with the Commission's decisions on the issues addressed at arbitration. It is the burden of the parties to properly reflect any agreements between the parties that were not presented for arbitration to the Commission. Alleged failure by BellSouth to

properly reflect such voluntary agreements is not a matter reviewed by state commissions pursuant to Section 252(e)(2)(b) of the Act, nor does it constitute a "sham" or "frivolous" filing intended for delay. The Act requires the parties to present for arbitration those things that cannot be negotiated and to resolve, through good faith negotiations, those things that do not need to be arbitrated. The Commission need only determine whether what is filed complies with the Act and with its arbitration decision. 47 U.S.C. § 252(e)(2)(b). Thereafter, it is incumbent upon the parties to develop an agreement that properly reflects the Commission's decisions, the state of the law, and the parties' negotiated provisions. Staff agrees with Supra that the Commission cannot require either party to sign an agreement that the parties do not believe properly reflects other agreements between the parties. However, as more fully set forth in the previous issue, the Commission can deem the previous agreement terminated -- leaving the parties with the options of: 1) timely filing a signed version of the negotiated agreement; 2) Supra adopting an approved agreement; or 3) otherwise terminating their relationship.

Based on the foregoing, staff recommends that the Motion to Strike be denied.

ISSUE 5: Is the Interconnection Agreement filed by BellSouth on July 15, 2002, compliant with the Commission's Orders in this Docket?

RECOMMENDATION: Yes. The Interconnection Agreement filed by BellSouth on July 15, 2002 complies with the Commission's Orders in this Docket. However, two sections of the Interconnection Agreement do not appear to comply with the current state of the law. As such, staff recommends that two sections of the Interconnection Agreement be revised as identified in the staff analysis. **(Simmons, King)**

STAFF ANALYSIS: With regard to State commission approval or rejection of an interconnection agreement, Section 252(e) of the Telecommunications Act states, in pertinent part:

> (1) APPROVAL REQUIRED - Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.
>
> (2) GROUNDS FOR REJECTION - The State commission may only reject-
> (B) an agreement (or any portion thereof) adopted by arbitration . . . if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) [pricing standards] of this section.

Section 252(e)(3) states:

> Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

By Order No. PSC-02-0413-FOF-TP, issued March 26, 2002 (Final Order on Arbitration) and Order No. PSC-02-0878-FOF-TP, issued July 1, 2002 (Reconsideration Order), the Commission resolved the thirty-seven substantive issues presented for arbitration by BellSouth and Supra Telecom[3]. The parties were required to submit a signed agreement that complies with the Commission's decisions within 14 days of issuance of the Order on Reconsideration. A signed agreement was to be filed by July 15, 2002.

On July 15, 2002, BellSouth filed an unsigned Interconnection Agreement. Staff has reviewed the document specifically to determine compliance with the Commission's Orders in this proceeding relating to the thirty-seven arbitrated issues addressed at hearing. In view of the fact that the agreement was not signed, staff also reviewed the entire document to determine compliance with other applicable FPSC and FCC decisions and orders.

Staff believes that the Interconnection Agreement filed on July 15, 2002, complies with the Commission's Orders in this docket (i.e., Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP). It appears to incorporate the Commission's decisions regarding the issues arbitrated at hearing. In fact, in some cases the language contained in the Agreement almost mirrors the language in the Commission's Orders. For example, with regard to a portion of Issue E the Commission Ordered[4]:

> . . . the final arbitrated agreement submitted to us for approval shall not reflect a reduced rate for a loop when the loop utilizes DAML equipment. (PSC-02-0413-FOF-TP, p. 53)

The Interconnection Agreement states:

> Loop rates specified in this Agreement shall not be reduced when the loop is provided to Supra using Digitally Added Main Line (DAML) equipment . . .. (Attachment 2, Section 3.2)

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[3]The orders also addressed several procedural motions.

[4]The example does not represent the Commission decision on Issue E in its entirety.

The Commission also ordered:

> The agreement shall reflect that when changes are to be made to an existing Supra loop that may adversely affect the end user, BellSouth should provide Supra with prior notification. (PSC-02-0413-FOF-TP, p. 53)

The Interconnection Agreement states:

> . . . in the event BellSouth wishes to add DAML equipment to an existing Supra UNE loop that may adversely affect the end user, BellSouth shall provide Supra Telecom with prior notification and must obtain Supra Telecom's authorization. (Attachment 2, Section 3.2)

While staff believes the Agreement complies with the Commission's Orders in this proceeding, staff identified two sections which do not comply with other applicable orders or decisions. The specific language in question has been highlighted.

First, Attachment 1, Section 3.7 of the Interconnection Agreement, which addresses resale provisions, states:

> Current telephone numbers may normally be retained by end user. [redacted] Supra Telecom has no property right to the telephone number or any other call number designation associated with services furnished by BellSouth, and no right to the continuance of service through any particular central office. BellSouth reserves the right to change such numbers, or the central office designation associated with such numbers, or both, solely in accordance with BellSouth's practices and procedures and on a non-discriminatory basis.

Staff believes that the highlighted text is incorrect and conflicts with current law. Section 3(a)(2)(46) of the Act defines number portability as the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

While staff is aware that BellSouth is the code holder for the telephone numbers at issue, staff does not believe the telephone numbers are BellSouth's property. The Industry Numbering Committee[5] Central Office Code (NXX) Assignment Guidelines (INC Code Guidelines) define a code holder as:

> An assignee of a full NXX code which was allocated by the CO Code Administrator. While the Code Holder is participating in thousand-block number pooling, the Codes Holder becomes a LERG Assignee at the Block Donation Date. (Central Office Code (NXX) Assignment Guidelines, July 21, 2002, INC 95-0407-008)

Furthermore the INC Code Guidelines state:

> The NANP resources are considered a public resource and are not owned by the assignees. Consequently, the resources cannot be sold, brokered, bartered, or leased by the assignee for a fee or other consideration. Transfer of code(s) due to merger/acquisition is permitted. (emphasis added) (Central Office Code (NXX) Assignment Guidelines, July 21, 2002, INC 95-0407-008, p. 6)

Lastly, and most importantly, Chapter 47 C.F.R., Section 52.23(a), confirms that:

> all local exchange carriers (LECs) must provide number portability in compliance with the following performance criteria:
>
> (6) Does not result in a carrier having a proprietary interest;

Staff believes BellSouth is clearly an assignee of codes and as such, the sentence identified in Attachment 1, Section 3.7 of the Interconnection Agreement, which asserts telephone numbers are the property of BellSouth is contrary to current law and should be deleted.

[5]Staff notes that BellSouth is a member of the Industry Numbering Committee.

Second, Attachment 4, Section 6.4, which addresses collocation provisions, states, in pertinent part:

> Construction and Provisioning Interval. . . . BellSouth will use best efforts to complete construction for collocation arrangements under ordinary conditions as soon as possible and within a maximum of [redacted] from receipt of a complete and accurate Bona Fide Firm Order.

The 100 calendar days provisioning interval for collocation arrangements conflicts with the interval established by the Commission in Docket No. 981834-TP, Order PSC-99-1744-PAA-TP. Specifically, that order states:

> Upon firm order by an applicant carrier, the ILEC shall provision physical collocation within 90 days or virtual collocations within 60 days. (Order at p. 17)

As such, staff recommends that BellSouth be required to modify the language in Attachment 4, Section 6.4 to reflect the Commission's decision that 90 calendar days is the appropriate provisioning interval for physical collocation.

CONCLUSION

Staff reviewed the July 15, 2002, Interconnection Agreement in its entirety. First, staff reviewed the Agreement issue-by-issue as addressed at hearing to determine compliance with the Commission's Orders in this docket. (Order No. PSC-02-0413-FOF-TP, issued March 26, 2002, (Final Order on Arbitration) and Order No. PSC-02-0878-FOF-TP, issued July 1, 2002 (Reconsideration Order)). Staff believes that the Interconnection Agreement complies with the Commission's Orders in this docket.

Second, staff reviewed the Interconnection Agreement for compliance with other applicable orders and laws. In its second review staff identified two sections of the Agreement which do not appear to comply. As such, staff recommends that the language contained in Attachment 1, Section 3.7, and Attachment 4, Section 6.4 be modified as noted in staff's analysis.